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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CLINTON WYATT,

Plaintiff and Respondent,

v.

OWN A CAR OF FRESNO,

Defendant and Appellant.

F075692

(Super. Ct. No. 16CECG02098)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Coleman & Horowitt, Darryl J. Horowitt and Jennifer T. Poochigian for Defendant and Appellant.

The Sadr Law Firm and Kasra Sadr for Plaintiff and Respondent.

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Nearly two years after Clinton Wyatt (Wyatt) purchased a used car from Own a Car of Fresno (Seller), he sought to rescind the parties' retail installment sales contract (Contract) based on alleged violations of the Consumer Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.). The matter proceeded to an arbitration through the American Arbitration Association (AAA) pursuant to an arbitration provision in the Contract. The

arbitration was conducted in two phases. The arbitrator first determined liability and damages and issued an interim award in Wyatt's favor for rescission and damages, along with injunctive relief, and awarded him attorney fees and costs, with the amount to be determined in a second proceeding. Seller then discovered the arbitrator failed to disclose he served as an arbitrator in an arbitration held two years earlier in which Wyatt's attorney represented the losing party. Seller asked AAA to vacate the interim award and appoint a new arbitrator. While AAA denied the request to vacate, it appointed a new arbitrator, who issued a final award of Wyatt's attorney fees and costs.

Before the new arbitrator was appointed, Wyatt petitioned to confirm the interim award, citing procedural provisions of the California Arbitration Act (CAA) (Code Civ. Proc., §§ 1280–1294.2).[1] In response, Seller filed a petition to vacate the interim award under the CAA based on the arbitrator's failure to disclose the prior arbitration. In opposing the petition to vacate, Wyatt argued that pursuant to a choice-of-law clause in the arbitration provision, the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1–16) applied and, under the FAA, Seller was not entitled to vacatur. The trial court agreed with Wyatt and denied Seller's petition to vacate, while granting Wyatt's petition to confirm the interim award.

Seller appeals from the judgment entered after the trial court confirmed the final award. Seller contends the trial court erred in denying its petition to vacate, as the CAA, not the FAA, governed, and under the CAA, vacatur was required.

In accordance with choice-of-law principles, the parties may limit the trial court's authority to vacate an award under the CAA by adopting the FAA's more restrictive procedural provisions. Here, the question is whether the Contract's arbitration provision, which states that any arbitration "shall be governed by the [FAA] and not by any state

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1 Undesignated statutory references are to the Code of Civil Procedure.

law concerning arbitration," incorporates the FAA's procedural provisions. We conclude that it does and Seller did not show it was entitled to vacation of the interim award under the FAA. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Wyatt purchased a used vehicle from Seller, a used car dealership, on October 15, 2013. To effect the purchase, the parties entered into the Contract, which contained an arbitration provision and arbitration addendum. The provision requires arbitration of "[a]ny claim or dispute" between the parties arising out of, among other things, the credit application, or the purchase or condition of the vehicle. The provision also states: "Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration. Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act."

On July 20, 2015, Wyatt sent Seller notice, as required under the CLRA, in which he claimed Seller had misrepresented and failed to disclose information concerning the vehicle's condition during the sales transaction. Wyatt requested rescission of the Contract and payment of consequential damages, as well as injunctive relief.

Arbitration Demand

On September 2, 2015, Wyatt demanded arbitration of his claims through the AAA. On February 3, 2016,[2] AAA sent notice to the parties that it had appointed William J. Tucker (Tucker) as the arbitrator. The notice stated the following documents were enclosed: (1) a "duly executed Notice of Appointment and Notice of Compensation Arrangements, which includes the arbitrator Disclosure Worksheet submitted by William J[.] Tucker"; (2) the "Provider Organization Disclosure which is required under California Code of Civil Procedure Section 1281.9"; and (3) "AAA's Neutrals Data Base

[2] Subsequent references to dates are to dates in 2016.

Search information," which stated that no party to the arbitration, lawyer in the arbitration, or attorney of the lawyer's law firm, was a member of the AAA's panel of neutral arbitrators.[3]

The 54-page "Provider Organization Disclosure Report" (disclosure report) appears to list prior and current arbitrations before the AAA involving the parties and their counsel. The disclosure report, however, does not identify the arbitrator who heard the matters, the identification of the prevailing party, or, in most cases, the damages awarded.

Arbitration Proceedings

Neither party challenged the arbitrator's appointment. Following submission of arbitration briefs and a telephonic hearing, Tucker issued an "INTERIM AWARD OF ARBITRATOR" on April 29. Tucker found in Wyatt's favor on his claims against Seller, awarded him, among other things, rescission of the Contract, and ordered Seller to pay Wyatt, upon return of the vehicle, the down payment, all monthly payments made, and the remaining balance on his auto loan. Tucker also awarded injunctive relief relating to certain disclosures Seller was required to make to prospective buyers, and enjoined Seller from making representations about an "Auto Check" report to a prospective buyer unless it provides a complete copy of the report to the buyer before a Contract is signed. Finally, Tucker found Wyatt to be the prevailing party and awarded Wyatt his attorney fees and costs, which were to be determined following further briefing

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3 The "Notice of Appointment and Notice of Compensation," which according to AAA's letter included Tucker's "Disclosure Worksheet," is not in the appellate record. According to one of Seller's attorneys, Paul Parvanian, the copies attached to his declaration as "Exhibit B" were the only disclosures his firm received from Tucker or AAA when Tucker was appointed. "Exhibit B" consists of (1) the February 3, 2016 letter from AAA appointing Tucker, (2) Tucker's two-page resume, (3) a document entitled "CALIFORNIA CONSUMER ARBITRATION DISCLOSURES PURSUANT TO ETHICS STANDARDS FOR NEUTRAL ARBITRATORS STANDARD 8(b)(1)(A)," and (4) the AAA disclosure report.

on that issue. The interim award was to "stay in full force and effect" until Tucker rendered the "Final Award."

After the interim award was issued, Seller's attorneys researched possible prior cases Tucker may have been involved in, either as an arbitrator or attorney. They discovered that Tucker had served as an arbitrator in a prior 2013 arbitration involving Resland Motors and Westlake Services, in which Wyatt's attorney, Kasra Sadr, represented the claimant, Thakwan Jirjees. This case was included on AAA's disclosure report, but the arbitrator, results of the case and monetary award, if any, were not listed.

On May 26, one of Seller's attorneys, Darryl J. Horowitt, asked AAA to remove Tucker as the arbitrator. Horowitt explained that his firm did not have any reason to inquire as to whether there were grounds to challenge Tucker's appointment because AAA's "standard reportings" showed the cases AAA administered for the parties and counsel only, and Tucker "stated in his disclosure that he did not have anything to disclose."[4] Horowitt's firm became concerned after receiving the interim award, as it was "so far out of the bounds" of other arbitrator's orders on consumer claims, so they "looked further" and discovered Tucker had previously served as an arbitrator in the Jirjees matter involving Sadr, which fact was not disclosed. Based on this information,

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[4] While Horowitt mentions Tucker's "disclosure," the record does not contain any disclosure worksheet from Tucker. As we previously noted, while AAA told the parties Tucker's "Disclosure Worksheet" was enclosed with the other documents it sent to the parties, the "Disclosure Worksheet" is not among the documents one of Seller's attorneys, Parvanian, declared were the only disclosures his firm received from Tucker or AAA. From this, one could assume AAA failed to send Tucker's "Disclosure Worksheet" to the parties. Parvanian, however, also declared: "As can also be seen from the disclosures, while AAA disclosed [the Jirjees] case in very limited form, Mr. Tucker did not mention this prior case at all." Horowitt's reference to Tucker's "disclosure" and Parvanian's statement regarding Tucker's failure to mention the prior case appear to indicate their firm did receive Tucker's disclosure worksheet, which failed to mention the *Jirjees* matter. Since the parties agree it was Tucker who failed to disclose the *Jirjees* matter, we need not resolve the discrepancy and will assume the same.

Horowitt objected to Tucker continuing to serve as the arbitrator and asserted the failure to make appropriate disclosures gave Seller grounds to vacate the award. Horowitt further stated that since only an interim award had been entered, there was time to disqualify Tucker and "appoint another arbitrator to conduct a hearing consistent with the AAA's consumer arbitration rules." While Horowitt was "not intending to besmirch Mr. Tucker's integrity or legal acumen[,]" he believed the circumstances warranted a change in arbitrators.

On June 16, AAA advised the parties it determined Tucker would be removed as arbitrator, but the interim award would remain in full force and effect. AAA advised that any request to set aside the interim award could be raised to the next arbitrator or, in the alternative, AAA would abide by a court order. AAA was in the process of inviting another arbitrator.

Trial Court Proceedings

On June 30, Wyatt filed a petition to confirm the interim award. Seller responded by filing a petition to vacate the interim award on the grounds the arbitrator failed to make required disclosures pursuant to sections 1281.85 and 1281.9. Seller alleged the agreement to arbitrate was contained in the Contract's arbitration provision, along with the "Arbitration Addendum" purportedly signed by the parties on October 15, 2013. The addendum states, in pertinent part, that "judgment upon the award rendered by the

arbitrator may be entered in any court having jurisdiction."[5] (Capitalization omitted.) The Contract and addendum were attached to the petition to vacate.[6]

Seller filed points and authorities which addressed both the petition to vacate and petition to confirm. Seller argued the petition to confirm should be denied because it was premature, since the award was not final and questions remained to be resolved by the new arbitrator, including whether the interim award would remain in effect, a new hearing would be conducted, or the monetary or injunctive awards would be changed. Seller also argued the interim award should be vacated under section 1286.2, subdivision (a)(6) because Tucker failed to disclose a ground for disqualification of which he was aware, namely that he had served as an arbitrator in a case involving Sadr.

In response, Wyatt contended Seller's arguments were meritless because (1) the request to confirm the interim award was not premature and the court had jurisdiction to confirm it; (2) the arbitration is governed by the FAA, not state law, since the arbitration provision states the arbitration "shall be governed" by the FAA, "and not by any state law concerning arbitration"; (3) under the FAA, there is no basis to vacate the award; (4) even if California law applied, there still would be no basis to vacate the award; and (5) Seller waived any right to challenge the arbitrator by waiting until the interim award was issued.

In a declaration supporting confirmation of the award, Sadr stated the disclosure report "disclosed to [Seller] all of the prior cases involving [Wyatt]'s attorney which relate either to Mr. Tucker and to the AAA," including the Jirjees matter. Sadr declared

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5 This language is included in the section of the addendum entitled "Award" which reads as follows: "The arbitrator's award shall be final and binding on all parties. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. However, in the event of an award of zero, or an award in excess of $100,000, or in the event of a[] grant of injunctive relief, the losing party may request a new arbitration under the rules of the arbitration organization, by a three-arbitrator panel." (Capitalization omitted.)

6 Interestingly, the addendum was not attached to the petition to confirm, which was declared to be a "true and complete" copy of the Contract.

that Tucker issued his award in the *Jirjees* matter on November 13, 2013, and the award was against Sadr's client.

In reply, Seller argued: (1) Wyatt was estopped from asserting the FAA applied, or had waived his right to enforce the FAA, because he brought the petition to confirm pursuant to California law, and therefore acknowledged California law, not the FAA, should apply; (2) the FAA did not preclude the application of California's disclosure requirements and penalty for failure to disclose; and (3) even if the FAA applied, the interim award should still be vacated because Seller was prejudiced by the arbitrator's failure to disclose.

Trial Court Ruling

Following oral argument on the petitions, the trial court took the case under submission and on September 30, it adopted its previous tentative ruling as the final order. The court granted Wyatt's petition to confirm, denied Seller's petition to vacate, and ordered the parties back to the arbitral forum for determination of the issue of fees and costs.

The trial court first found the petition to confirm was not premature, as the interim award determined all the issues between the parties and only left the amount of fees and costs to be determined. The court next held the FAA applied, as the parties' agreement stated it was governed by the FAA. The court found Wyatt had not waived the application of the FAA simply by filing his petition to confirm in state court and citing California procedural law, as the petition could not have been filed in federal court.

Noting that under the FAA, nondisclosure is grounds for vacatur when the undisclosed facts show "a reasonable impression of impartiality," the court found the evidence did not meet that standard, as the facts Seller presented did not "clearly show that there actually was a *non-disclosure* here, as much as there was an *ambiguous* disclosure." It appeared the disclosure report listed all AAA arbitrations involving any party or attorney involved in the present action, and the one case Seller was concerned

about, which actually involved Tucker and Sadr was on the list. The court found this information did not show any more "partiality" toward Sadr than it did towards Seller or its attorney, and the facts Sadr supplied showed there was no basis to find an impression of partiality, as Tucker did not rule in favor of Sadr's client.

Finally, the court found that even if California law applied, vacatur was not required. While Tucker did not indicate the cases on which he served as arbitrator, the fact that Sadr appeared numerous times on the list was sufficient to raise the concern he might have been involved in not just one, but numerous arbitrations with Tucker, which could mean Tucker did not notate the cases on which he served in order to hide a bias in Sadr's favor. Although the fact Tucker did not include this information on any of the cases listed would mitigate against such an assumption, Seller "at least had the right to be concerned and want more information." Seller, however, did not have the right to hold these concerns "in reserve" in the event of a negative ruling, and Seller's attorney could have easily asked for further information from Tucker or served a timely disqualification.

Second Phase of Arbitration

A new arbitrator, Russell D. Cook, was subsequently appointed to conclude the case. After receiving briefing from the parties and hearing oral argument, Cook issued a final award on attorney fees and costs, in which he awarded Wyatt $53,520 in attorney fees and nearly $5,000 in costs. Wyatt filed a petition to confirm the final award, which the trial court granted after Seller filed a notice of non-opposition. Judgment in conformance with the arbitration award was later entered.

DISCUSSION

Seller contends the trial court erred in denying its petition to vacate the interim award. Based on the plain meaning of the arbitration provision, we conclude the parties agreed the FAA, not the CAA, would govern the arbitration. Because we conclude the trial court properly denied the petition to vacate under the FAA, we do not address whether the petition should have been denied if the CAA applied.

The denial of a petition to vacate an arbitration award is reviewed de novo on appeal, including issues concerning the arbitrator's alleged failure to make required disclosures. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385–388.) The question of whether the arbitration provision incorporated the FAA's procedural provisions "is a question of law involving interpretation of statutes and the contract (with no extrinsic evidence)," and therefore also requires application of the de novo standard of review. (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1117 (*Rodriguez*).) We interpret the arbitration provision in light of its plain meaning, giving the words of the contract their usual and ordinary meaning. (*Valencia v. Smith* (2010) 185 Cal.App.4th 153, 162 (*Valencia*).)

"In California, '[g]eneral principles of contract law determine whether the parties have entered into a binding agreement to arbitrate.'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) Thus, the interpretation of the arbitration provision is governed by the parties' mutual intent. This intent is found, if possible, solely in the agreement's written provisions. (*Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447 (*Gloster*).)

The FAA applies to contracts that involve interstate commerce (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 212), but since arbitration is a matter of contract, the FAA also applies if it is so stated in the agreement. (*Gloster, supra,* 226 Cal.App.4th at pp. 446–447.) Here, the arbitration provision expressly states that "[a]ny arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1, et. seq.) and not by any state law concerning arbitration." Thus, the clear intent of the arbitration provision is that the FAA applies. The question here is the extent of that application—does it encompass only the FAA's substantive provisions, which means judicial review would proceed under the CAA's procedural rules, or does it encompass the FAA's substantive *and* procedural rules on judicial review.

The answer is important, since the CAA and FAA apply different standards for vacating an arbitration award when an arbitrator fails to disclose a conflict. Under the CAA, a proposed neutral arbitrator must disclose to the parties "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial," (§ 1281.9, subd. (a)) including whether he or she had served as a party arbitrator or neutral arbitrator in another matter involving any party to the present arbitration or any party's lawyer. (§ 1281.9, subd. (a)(3) & (4).)[7] An arbitration award must be vacated if an arbitrator fails to timely disclose a required matter. (§ 1286.2, subd. (a)(6)(A); *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1311; *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 844–845 (*Ovitz*); *International Alliance of Theatrical Stage Empoyees, etc. v. Laughon* (2004) 118 Cal.App.4th 1380, 1385–1387, 1393–1394 [failure to disclose prior service as neutral arbitrator in matter involving party's counsel constituted grounds to vacate award without showing of possible bias].)

In contrast, under the FAA failures in disclosure are not necessarily grounds for vacatur. As pertinent here, the FAA permits the vacating of an arbitration award on a showing of "evident partiality or corruption in the arbitrators …." (9 U.S.C. § 10(a)(2); *Schmitz v. Zilveti* (9th Cir. 1994) 20 F.3d 1043, 1044–1046 (*Schmitz*).) The Ninth Circuit has identified two categories of evident partiality cases: actual bias cases and nondisclosure cases. (*Woods v. Saturn Distribution Corp.* (1996) 78 F.3d 424, 427.)[8]

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[7] The disclosure must include the names of the parties involved in the other dispute and the names of their attorneys, the date of the arbitration award, identification of the prevailing party, and the amount of any monetary damages awarded. (§ 1281.9, subd. (a)(3) & (4).) The disclosures must be made in writing within 10 calendar days after service of notice of the proposed appointment (§ 1281.9, subd. (b)), and the parties may disqualify the proposed neutral arbitrator based on the disclosures. (§ 1281.91, subd. (b).)

[8] Federal courts are divided on the meaning of "evident partiality" under 9 United States Code section 10(a)(2). (*Montez v. Prudential Securities, Inc.* (2001) 260 F.3d 980,

Since actual bias is not at issue here, we look at nondisclosure cases. In those cases, "vacatur is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party." (*Ibid.*; *Lagstein v. Certain Underwriters at Lloyd's London* (9th Cir. 2010) 607 F.3d 634, 646 [arbitrator "was required to disclose only facts indicating that he 'might reasonably be thought biased *against one litigant and favorable to another*'"]; *Schmitz, supra,* at p. 1047 [standard for determining evident partiality in nondisclosure cases is whether there is a "'[r]easonable impression of partiality'"].)

The California Supreme Court has determined "the FAA's *procedural* provisions (9 U.S.C. §§ 3, 4, 10, 11) do not apply [in California courts] unless the contract contains a choice-of-law clause expressly incorporating them." (*Valencia, supra,* 185 Cal.App.4th at p. 174.) In *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409–410, the court concluded that where the contract did not contain a choice-of-law clause, the FAA's procedural provision permitting a jury trial on certain issues (9 U.S.C. § 4) did not apply in state court and instead CAA's procedural provisions, which mandated the use of law and motion procedures, governed. In *Cronus Investments Inc. v. Concierge Services* (2005) 35 Cal.4th 376, the court determined section 1281.2, subdivision (c), which allows a court to stay or deny arbitration under certain circumstances, did not conflict with the FAA. Therefore the contract's choice-of-law clause, which stated "'[t]he designation of ... a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the [FAA], if it would be applicable'", did not require application of the FAA. (*Cronus, supra,* at pp. 381, 392–394.)

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983 [surveying cases and noting conflict]; *Ovitz, supra,* 133 Cal.App.4th at p. 850 [noting the uncertainty].) Here, the trial court applied the standard the Ninth Circuit adopted. As Seller does not contend that was error, we also apply it.

These cases demonstrate that "the procedural provisions of the CAA apply in *California* courts by default. 'There is no *federal policy* favoring arbitration under a *certain set of procedural rules* ....' (*Volt [Info. Sciences v. Leland Stanford Jr. U.* (1989)] 489 U.S. [468], 476, italics added.) But the parties may '*expressly* designate that any arbitration proceeding [may] move forward under the FAA's procedural provisions rather than under state procedural law.' (*Cronus, supra,* 35 Cal.4th at p. 394, original italics.) Absent such an express designation, however, the FAA's procedural provisions do not apply in state court." (*Valencia, supra,* 185 Cal.App.4th at p. 174.)

In *Rodriguez, supra,* 136 Cal.App.4th 1110, the appellate court applied *Cronus* to determine whether the parties to an arbitration provision in which they agreed to arbitrate claims arising out of the contract " '[p]ursuant to the Federal Arbitration Act' " intended to apply the FAA to the exclusion of California procedural law. (*Rodriguez, supra,* at pp. 1121–1122.) The court concluded the FAA procedural rules applied because the phrase "'pursuant to the FAA'" was "broad and unconditional"; it required the parties to arbitrate "'in conformance to' and 'agreement with' the FAA"; and there was no other contract provision suggesting the parties intended to incorporate California arbitration law or to arbitrate "'in conformance to' some provisions of the FAA but not others." (*Rodriguez, supra,* at p. 1122.) While section 3 of the FAA, which requires the court to stay judicial proceedings pending the completion of arbitration, "may not generally apply to state courts, here the parties did as *Cronus* suggested they could: They expressly designated *their* arbitration proceeding 'should move forward under the FAA's procedural provisions rather than under state procedural law.' (*Cronus, supra,* 35 Cal.4th at p. 394.)" (*Rodriguez, supra,* at p. 1122.)

In the instant case, the parties' arbitration provision states that any arbitration "shall be governed by the [FAA] *and not by any state law concerning arbitration*" and the arbitrator's award "will be final and binding on all parties, *subject to any limited right to appeal under the [FAA]*." (Italics added.) Plainly, by stating that "state law

concerning arbitration" does not govern the arbitration, the parties expressly agreed FAA's procedural rules, rather than the CAA's rules, would apply to judicial review of a petition to vacate the interim award. As in *Rodriguez*, there is no other contract provision that suggests the parties intended to incorporate California arbitration law or to arbitrate according to some provisions of the FAA but not others. To the contrary, the provision states that no state law concerning arbitration governs and any review of the arbitrator's award is subject to the FAA's limited right to appeal. As the court stated in *Rodriguez*, "[w]hile we may question the wisdom of the parties' choice, ... the parties were free to choose their arbitration rules. The court will not rewrite their contract." (*Rodriguez, supra,* 136 Cal.App.4th at p. 1122.)

Relying on *Ovitz, supra,* 133 Cal.App.4th 830, Seller contends that even though the arbitration in this action was held under the FAA, once the petition to vacate was filed in state court, "the CAA and its rules for mandatory disclosures and for vacating awards applied. The court was not bound to apply the FAA only." In *Ovitz*, the appellate court held that where an arbitrator failed to disclose that he intended to entertain offers of employment from the parties' attorneys and his subsequent acceptance of such employment, the arbitration award was required to be vacated under section 1286.2, subdivision (a)(6)(A). (*Ovitz, supra,* 133 Cal.App.4th at pp. 844–845.)

The court rejected the contention the FAA preempts California law governing the vacating of an arbitration award because "a review of the relevant statutory language, the congressional purpose of the FAA, and the parties' arbitration agreement demonstrates that the FAA does not preempt section 1286.2(a)(6)(A)." (*Ovitz, supra,* 133 Cal.App.4th at pp. 848–849.) The court concluded (1) the wording of the relevant sections of the FAA evidences a congressional intent not to preempt state law, as the language of sections 10 and 12 of the FAA "strongly suggest that they apply only in federal court proceedings" (*Ovitz, supra,* at p. 851); (2) vacating an arbitration award under the CAA reflects "a considered policy judgment of the Legislature and Judicial Council," (*Ovitz,*

supra, at p. 854) which does not violate the letter or spirit of the FAA; and (3) application of section 1286.2, subdivision (a)(6)(A) is not inconsistent with the parties' arbitration agreement, as the agreement provided the arbitration would "be final and binding, *and judicial review shall be limited as provided by California Code of Civil Procedure § 1286.2 or other applicable law*." (*Ovitz, supra,* at p. 855, original italics.)

Ovitz does not apply here for the simple reason that application of section 1286.2, subdivision (a)(6)(A) in this case is inconsistent with the parties' arbitration agreement, which provides that state arbitration law does not govern the proceeding and the arbitrator's award is subject to "any limited right to appeal" under the FAA. As our Supreme Court stated in *Cronus*, parties to an arbitration agreement may expressly designate that an arbitration should proceed under the FAA's procedural provisions rather than state procedural law. (*Cronus, supra,* 35 Cal.4th at p. 394.) That is precisely what the parties did here.[9]

Seller contends the agreement to arbitrate consists of both the Contract's arbitration provision and the addendum, and when considered together, it is not clear the parties intended to apply the FAA to the exclusion of California procedural law. Seller claims the arbitration provision in the Contract provides the arbitration is conducted under the AAA rules and the FAA applies, while the addendum "does not limit the parties to the FAA; it instead provides that 'Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.'" Wyatt objects to our consideration of the addendum, arguing Seller waived the applicability of the addendum by failing to raise it in the arbitration and the trial court, and the addendum was never

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9 For this reason, Seller's reliance on *Los Angeles Unified School Dist. v. Safety National Casualty Corporation* (2017) 13 Cal.App.5th 471 is misplaced. There, the parties' agreement was "completely silent, with no terms mentioning or alluding to the FAA, California law, or any other state law or rules of procedure." (*Los Angeles Unified School Dist., supra,* at p. 479.) Here, the parties' agreement clearly provides that FAA's procedural rules apply.

authenticated. Seller responds that we may consider the addendum because it is part of the trial court record, as Seller attached the addendum to its petition to vacate and identified it as part of the arbitration agreement, and Wyatt did not object.

Even if the addendum is properly before us, when it is read together with the arbitration provision in the Contract, there is no ambiguity. (Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together"]; see *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 580 [informed consent agreement and arbitration form signed at the same time should be construed together].) Contrary to Seller's assertion, the arbitration provision's requirement that the arbitration be governed by the FAA and "not by any state law concerning arbitration" is consistent with the addendum's language that judgment on arbitrator's award "may be entered in any court having jurisdiction." The Contract's arbitration provision says FAA, not state, procedural law must be applied, while the addendum allows a party to seek confirmation of the arbitrator's award in any court that has jurisdiction. Confirmation of the award would be pursuant to the FAA regardless of whether it was sought in state or federal court. Since there is no conflict between the arbitration provision and addendum, the addendum's silence on whether the FAA applies does not create an ambiguity.

This leaves whether vacatur was required under the FAA, an issue Seller does not address in its appellate briefs.[10] As relevant here, the FAA provides that an award may

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10 In the trial court, Seller argued the interim award should be vacated under section 10(a)(3) of the FAA, which provides for vacatur "where the arbitrators were guilty of ... any ... misbehavior by which the rights of any party have been prejudiced." (9 U.S.C. § 10(a)(3).) Seller argued Tucker misbehaved by failing to disclose the *Jirjees* matter, which gave Sadr an advantage, since he knew Tucker did not favor hearings with live testimony, and prejudiced Seller, since Seller had no reason to investigate how Tucker would conduct a hearing. The trial court did not address this argument and Seller does not renew it on appeal.

be vacated for "evident partiality or corruption in the arbitrators" (9 U.S.C. § 10 (a)(2)), which requires a showing of a "'[r]easonable impression of partiality.'" (*Schmitz, supra,* 20 F.3d at p. 1047.) Courts applying the nondisclosure standard have determined an arbitration award may be vacated "when an arbitrator failed to disclose a prior relationship with a party to the arbitration or a stake in the arbitration's outcome." (*Nordahl Development Corp., Inc. v. Salomon Smith Barney* (D. Or. 2004) 309 F.Supp.2d 1257, 1266.) In general, evident partiality has been found where the following were not disclosed: (1) "an arbitrator's financial interest in the outcome of the arbitration"; (2) "an arbitrator's ruling on a grievance that directly concerned his own lucrative employment for a considerable period of time"; (3) "a family relationship that made the arbitrator's impartiality suspect"; (4) "the arbitrator's former employment by one of the parties"; and (5) "the arbitrator's employment by a firm represented by one of the parties' law firms." (*Toyota of Berkeley v. Automobile Salesman's Union, Local 1095* (9th Cir. 1987) 834 F.2d 751, 756.)

None of these situations are present in this case. Seller does not cite any financial or personal relationship between Tucker and Sadr. There is also no evidence of an

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At oral argument, Seller's attorney argued for the first time that if the FAA applied, vacatur was required under *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145. There, the United States Supreme Court held an arbitrator's failure to disclose that he had been involved in business dealings with one of the parties to the arbitration over a four- to five-year period created an "impression of possible bias" which required vacatur of the arbitration award, even though there was no evidence of actual bias. (*Id.* at pp. 146–149.) The court did not hold, as Seller's attorney suggested, that the failure to disclose any prior relationship with a party's attorney requires vacatur; instead, the court stated it could not believe Congress intended "to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." (*Id.* at p. 150.) The Ninth Circuit Court of Appeals has held that under *Commonwealth Coatings*, "'evident partiality' is present when undisclosed facts show 'a reasonable impression of partiality.'" (*Schmitz, supra,* 20 F.3d at p. 1046.) As we explain, Tucker's finding against Sadr's client in an arbitration held two years earlier does not show a reasonable impression of partiality.

employment or familial relationship between Tucker and any attorney or party to the arbitration. The evidence shows that Tucker failed to disclose that he served as arbitrator in an arbitration held two years earlier, in which Sadr represented one of the parties and Tucker found against Sadr's client. As the trial court determined, there is no basis to find an impression of partiality or to reasonably think Tucker was biased against Seller and favorable to Wyatt.

Finally, Seller contends it is "unfair" to apply the CAA to Wyatt's petition to confirm the interim award but not the petition to vacate. Seller asserts that by bringing the petition to confirm under the CAA, Wyatt sought benefits from California law and asked the trial court to consider the matter in accordance with California procedural law, which "forced" Seller to bring its opposition and cross-petition under the CAA's rules and time limits. Since the petition to confirm did not mention the FAA, Seller was "forced to oppose based on California law (and not federal law)," and "forced" to reply under the same provisions of the CAA Wyatt asserted. Seller argues that "[b]y adopting California procedural law as its choice of law in confirming the [a]ward," Wyatt should be barred from arguing federal law applies to the petition to vacate. Seller concludes that "[u]nfairness" had resulted, as Seller was "deprived of the opportunity to fully brief and present its case under the FAA."

Seller, however, has failed to cite any legal authority to support this argument. When a brief fails to contain a legal argument with citation to authorities, we may treat the argument as waived or abandoned. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.) Moreover, Seller does not explain how it would have responded differently in the lower court had Wyatt cited the FAA in the petition to confirm or any advantage Wyatt gained by citing the CAA.[11] Seller does not contend the petition to confirm would not have been granted had the FAA's procedural rules been applied to it.

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[11] At oral argument, Seller's attorney asserted Wyatt could have filed in state court and invoked the FAA, and argued his failure to do so was prejudicial because it shortened

In sum, we conclude the FAA's procedural rules applied to the petition to vacate and under those rules, the trial court was not required to vacate the interim award. Therefore, the trial court did not err in denying the petition to vacate the interim award and granting the petition to confirm.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

_____
FRANSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

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DESANTOS, J.

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the time Seller had to respond to the petition to confirm and file its petition to vacate. The attorney claimed that if Seller knew Wyatt was relying on the FAA, it would have filed its petition to vacate under Rule 10 of the FAA and discussed the evident partiality standard. We fail to see the prejudice, as Seller did discuss Rule 10 of the FAA in its reply brief on the petition to vacate.